Filed 5/3/10 Pendeleton v. Werner Enterprises CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KAREN PENDLETON,

Plaintiff and Respondent,

v.

WERNER ENTERPRISES, INC. et al.,

Defendants and Appellants.

F056880

(Super. Ct. No. 07CECG00538)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John F. Vogt, Judge.

Harrington, Foxx, Dubrow & Canter and Susan A. Watson for Defendants and Appellants.

Law Offices of Wagner & Jones, Nicholas J.P. Wagner, Andrew B. Jones and Lawrence M. Artenian for Plaintiff and Respondent.

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Plaintiff suffered personal injuries when her automobile was rear-ended by a tractor-trailer driven and owned by defendants. The jury determined that defendants' negligence caused the collision and awarded plaintiff $5,700 and $1,200 for past medical expenses and past wage loss, respectively, and $11,400 in general damages. Plaintiff also requested that she be awarded $150,000 for future back surgery expenses and $10,000 for future wage loss attributable to undergoing that surgery. The jury awarded plaintiff the full amount for future medical and earnings loss. Both sides' motions for a new trial were denied by the trial court. Only defendants have appealed. We conclude that plaintiff's violation of an order in limine prejudiced defendants. Therefore, we remand to the trial court for a new trial on damages only.

BACKGROUND

The subject vehicular accident occurred on April 8, 2005. Plaintiff was treated at the emergency room of a local hospital. At the referral of her attorney, she was seen by Dr. Richard Goka, a Fresno physician specializing in physical and rehabilitation medicine, from May to October 2005, at which time she moved to Reno, Nevada. Dr. Goka saw her thereafter periodically until June 21, 2006, when he reported that she had reached her maximum medical improvement. At that time, he "wasn't sure if there was a surgical issue." He felt she needed to see a physician two or three times a year about her back pain. In December 2006, Dr. Goka closed his practice but continued to do "medical-legal work."

In March 2008, after speaking with plaintiff's attorney, Dr. Goka ordered an MRI of plaintiff's back. He did not see plaintiff at that time. After reviewing the radiologist's report on the MRI, Dr. Goka wrote a report dated March 19, 2008, indicating that plaintiff "might" be a candidate for back surgery if her symptoms worsened.

Trial was set for October 6, 2008. Dr. Goka was listed by plaintiff as a nonretained expert. Defendants deposed him on September 8, 2008. Dr. Goka had last

seen plaintiff in June 2006. On October 3, 2008, three days before trial, plaintiff was examined by Dr. Goka in her attorney's office. Range of motion and reflexes were within normal limits. Straight leg testing was negative. Objectively, she was "a little worse" than his previous examination in June 2006.

On October 2, 2008, four days before the trial date, plaintiff was seen by Dr. Kip, an orthopedic surgeon located in Reno, Nevada. Dr. Kip was not designated as an expert trial witness by plaintiff, was not deposed and did not testify at trial. Dr. Goka spoke with Dr. Kip on October 3, 2008. According to Dr. Goka and the plaintiff, Dr. Kip was of the opinion that plaintiff needed surgery.

On the day of trial, defendants moved in limine for orders precluding plaintiff and Dr. Goka from testifying about Dr. Kip's opinion whether plaintiff required back surgery. In urging the court to preclude Dr. Goka from testifying about Dr. Kip's opinion, defense counsel told the court:

> "One, there's an issue that I heard this morning that Dr. Goka has talked to the surgeon that reviewed plaintiff last Thursday, and there is going to be what I understand a back-door attempt to get in the surgeon's opinion through conversations with Dr. Goka when the surgeon has not been disclosed, has not been deposed, has not been named in any way or made available to the defendants within the standard timing required by the Code of Civil Procedure."

Plaintiff's counsel opposed the motion and stated:

> "My understanding is that Dr. Goka has examined [plaintiff]. He found out that she had seen a surgeon in Reno. And it's also my understanding, although I'm not sure that Goka has spoken with the surgeon who I believe his name is Kitts or Kip in Reno. And in—as with any expert, if an expert bases his opinion in part on what—some information has been disclosed to him by another expert, that expert can explain that what is—what his opinion is, not what the other expert's opinion is, what his opinion is, and he could state that one of the—the basis for that opinion, which is usually based upon numerous factors."

The court granted the motion, stating:

> "Okay. What I heard is hearsay and I don't intend to let that in. Now, we all know that an expert can use virtually anything to form an opinion, but it still has to be that expert's opinion."

Notwithstanding the court's in limine order precluding plaintiff from introducing Dr. Kip's opinion through the testimony of Dr. Goka, plaintiff's counsel had the following exchange with Dr. Goka during direct examination:

> "Q. Okay. Now, is it your opinion at the present time—you've recently seen [plaintiff]; correct?
>
> "A. I examined her on Friday, last Friday.
>
> "Q. Okay. And you know she was seen by an orthopedic surgeon the day before?
>
> "A. Right, in Reno, Nevada.
>
> "Q. Okay. And have you talked to that orthopedic surgeon about her condition?
>
> "A. Yes, I did.
>
> "Q. Okay. Since she was seen by him?
>
> "A. Right.
>
> "Q. Okay. Now, is it your opinion at the present time that [plaintiff] is going to need surgery as a result of this accident?
>
> "A. It appears that I had stated before that she would eventually need to have that disk replaced and with the new surgeries with disk replacements it's probably the best choice, and he basically concurred with that after doing some other—
>
> "[Defense Counsel]: I object. I think we've covered this in a motion in limine—
>
> "The Court: Okay.
>
> "[Defense Counsel]: —and—

> "The Court: I understand. Proceed.
>
> "[Defense Counsel]: I would make a motion.
>
> "The Court: The objection is sustained. The references made in the statement made by the other surgeon to this doctor are excluded from this [witness's] testimony. You are directed not to consider that other doctor's statement to this other witness."

Shortly thereafter, defense counsel made a motion for a mistrial:

> "based on Dr. Goka's blurting out what his conversation with Dr. Kip was. I think that was fairly clearly addressed in motions in limine, and my understanding is the court's order was there would be no such comment and there has been. The barn door has been opened. I think it's highly prejudicial for all the reasons that I stated in our motions in limine, so I would—I would move for a mistrial at this time."

Plaintiff's counsel told the court, "I did tell Dr. Goka he was not to state what Dr. Kip told him." The court denied the motion, noting that the jury was immediately admonished to disregard that portion of the testimony.

The only evidence presented by plaintiff about future surgery came from plaintiff and Dr. Goka. Plaintiff testified that she had seen Dr. Kip, a Reno orthopedic surgeon, on October 2, 2008, and that "He is now my doctor." When asked about her intentions regarding future medical care, she answered:

> "I'm going to do everything [Dr. Kip] tells me to do. They're supposed to call me with an appointment to start more physical therapy and injections, and if that doesn't work we're going to continue on to surgery."

CONTENTIONS ON APPEAL

Defendants' primary contention on appeal relates to the jury's award of future medical and earnings loss. Defendants claim they were prejudiced when, despite their objections and an order in limine, both plaintiff and Dr. Goka testified that Dr. Kip, who did not testify, was not designated as an expert witness and was never deposed, was of the opinion that her condition necessitated back surgery. In their new trial motion and on appeal, defendants contend that they are entitled to a new trial due to, among other

grounds, irregularities in the proceedings. (Code Civ. Proc., § 657, subd. 1.) The trial court denied defendants' motion.

DISCUSSION

Standards of Review

We review a denial of a new trial motion de novo. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417, fn. 10; *Young v. Brunicardi* (1986) 187 Cal.App.3d 1344, 1348.)[1] We apply the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) We review the factual determinations made below under the substantial evidence standard by determining whether the record below contains evidence of ponderable legal significance, reasonable in nature, credible and of solid value in support of the conclusion of the trier of fact. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Award for Future Medical Care Requires Expert Medical Testimony

Civil Code section 3283 states that "[d]amages may be awarded … for detriment … certain to result in the future." Case law provides that this section means that a plaintiff may recover for future damages if the detriment is "'reasonably certain'" to occur. (*Garcia v. Duro Dyne Corp*. (2007) 156 Cal.App.4th 92, 97.) An award for future medical care must be based on medical expert testimony. (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 243 [future medical expenses beyond the common experience of jurors]; *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402 [in personal injury action, causation must be proven within a reasonable medical probability based upon competent expert testimony]; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 995 [evidence of future detriment sufficient if based on

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1 Plaintiff erroneously asserts that the standard of review here should be the abuse of discretion standard and cites cases in which the appellate court reviewed an order *granting* a new trial. The correct standard following the *denial* of a new trial motion is de novo or independent review. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.)

expert medical opinion], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664; *Cano v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 225, 232 [“‘award will be upheld when there is precise, unequivocal, expert medical opinion regarding the need for future treatment’”].) On the other hand, expert medical opinion does not always constitute substantial evidence. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1110 [an expert's opinion which rests upon guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence].)

Plaintiff's Examination of Dr. Goka Constituted An Irregularity in the Proceedings

An irregularity in the proceedings, which prevents a party from having a fair trial, is grounds for a new trial and grounds for reversal on appeal. (Code Civ. Proc., § 657, subd. 1; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 25, pp. 607-608; 7 Witkin, *supra*, Trial, §§ 210-213, pp. 253-257, cases & authorities collected.) An irregularity can take many forms, including making reference to inadmissible matters or matters not in evidence. (7 Witkin, *supra*, §§ 221-222, pp. 269-273, cases & authorities collected.) The same is true of making reference to evidence that the trial court has already ruled to be inadmissible.

In this case, it is undisputed that $160,000 of the $178,300 jury verdict was attributable to future medical expenses and wage loss associated with future back surgery. Whether plaintiff's condition warranted future surgery was a major issue of contention during the trial. For this reason, the defense was apprehensive about any attempt on the part of plaintiff to introduce directly or indirectly the hearsay opinion of Dr. Kip, a surgeon who had examined plaintiff the week before trial, but who had never been disclosed as an expert, was never deposed and did not testify at the trial. Defendants' motion in limine to preclude Dr. Goka from testifying about Dr. Kip's opinions was granted. Despite the clarity of that order, immediately before soliciting

Dr. Goka's opinion about plaintiff's need for surgery, plaintiff's counsel asked Dr. Goka whether he was aware that plaintiff had been seen by an orthopedic surgeon in Reno (Dr. Kip) the previous week and whether he had talked to that surgeon about her condition. After giving affirmative responses to those questions, Dr. Goka then testified that the Reno surgeon had "concurred" with him that surgery was needed.

This line of questioning and Dr. Goka's answer violated the order in limine. Plaintiff's counsel was entitled to elicit Dr. Goka's opinion whether plaintiff needed surgery. He was prohibited from introducing Dr. Kip's opinion through Dr. Goka. Yet, that is what occurred. Not only was plaintiff's counsel aware of the in limine order, but he represented to the court that he had advised Dr. Goka of the order ("I did tell Dr. Goka he was not to state what Dr. Kip told him"). These actions by plaintiff's counsel and Dr. Goka were direct violations of a court order and constituted an "irregularity in the proceedings." (Code Civ. Proc., § 657, subd. 1.) The remaining question is whether this irregularity prevented defendants from having a fair trial.

The Violation of the In Limine Order Deprived Defendants of a Fair Trial

Motions in limine are usually brought at the beginning of a trial and are designed to preclude the presentation of evidence deemed inadmissible and prejudicial. The advantage of having the court rule in limine is to avoid the futile attempt to """"unring the bell""""" in the event the jury hears evidence that is inadmissible. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669-670.) In limine orders serve other purposes, including allowing the trial court more careful consideration of evidentiary issues than would occur during the trial. They also minimize bench conferences and disruptions during trial, and allow for an uninterrupted flow of evidence. By resolving potentially important issues at the outset, they enhance the efficiency of trials and promote settlements. (*Ibid*.)

When an order in limine prohibiting the introduction of evidence is violated, the court may grant a mistrial or, as is the usual case, admonish the jury to disregard the

testimony the court previously ruled inadmissible. While it is generally true that a prompt and correct admonition to the jury to disregard improper statements cures the error (*Wank v. Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1114-1115; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 794), some errors are not curable by an admonition depending upon the facts of the case (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 392 ["like trying to unring a bell"].) In this case, the admonition was inadequate because the otherwise admissible evidence that plaintiff required surgery was marginal.

Whether plaintiff does or does not need surgery is a medical determination that can only be made by someone with relevant medical expertise. (*Niles v. City of San Rafael, supra,* 42 Cal.App.3d at p. 243; *Jones v. Ortho Pharmaceutical Corp., supra,* 163 Cal.App.3d at p. 402; *Bihun v. AT&T Information Systems, Inc., supra,* 13 Cal.App.4th at p. 995.) In order to recover damages for future surgery, plaintiff must establish with competent medical expert testimony that the accident produced a medical condition that requires surgery. As a lay person, she is not qualified to offer that opinion. During pretrial motions, plaintiff convinced the trial court that she could testify about her intention to have surgery based on advice she received from Dr. Kip. She testified that she was "going to do everything [Dr. Kip] tells me to do. They're supposed to call me with an appointment to start more physical therapy and injections, and if that doesn't work we're going to continue on to surgery."

An out-of-court statement offered to prove a non-declarant's relevant state of mind does not violate the hearsay rule and is admissible for that limited purpose. (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2009) Hearsay and Nonhearsay Evidence, § 1.38 et seq., pp. 27-28.) Plaintiff's intention to have surgery is not an issue in the action unless there is independent medical testimony that she needs surgery. Her own testimony that she intends to have surgery does not satisfy the evidentiary requirement that her need for surgery be established by expert medical testimony. Thus, her testimony that she would "continue on to surgery" if physical therapy and injections

didn't work was admissible for the limited purpose of showing that she intended to have the surgery if necessary and is thereby justified in seeking recovery for future surgery expenses and related earning losses, but such testimony is not admissible to prove that future surgery was medically necessary.

The only admissible expert testimony offered in support of plaintiff requiring future surgery came from Dr. Goka. Dr. Goka practiced rehabilitation medicine, but not surgery. During the time he treated plaintiff, he never recommended surgery and "wasn't sure if there was a surgical issue." His opinion in March 2008, after the MRI was done, was that she "might" be a surgery candidate. His October 3, 2008, examination (several days before trial) revealed that she was objectively "a little worse" than she was the last time he examined her in June 2006. He testified that he would defer to a surgeon on this question. Dr. Goka's opinion that plaintiff needed surgery falls short of being "'precise, unequivocal, expert medical opinion'" regarding the need for future surgery. (*Cano v. Workers' Comp. Appeals Bd.*, *supra*, 81 Cal.App.4th at p. 232.)

In summary, the jury heard from Dr. Goka that a nontestifying surgeon was of the opinion she needed surgery. Dr. Goka, a nonsurgeon, testified that she needed surgery. The defense called a surgeon who disagreed. Dr. Goka's opinion was bolstered by the improper reference to Dr. Kip's opinion. Our independent review of this record leads us to conclude that the court's admonition to the jury was not curative. Nor can we say that the outcome would not have been different had there been no reference to Dr. Kip's opinion. We conclude that the irregularity prejudiced defendants.

CONCLUSION

The irregularity did not affect the finding of liability. The irregularity deprived defendants of a fair trial on the issue of damages. We therefore reverse the order denying defendants' motion for new trial and remand for a new trial on damages only.

DISPOSITION

The lower court judgment is reversed and the matter is remanded to that court with directions to order a new trial on damages only. Costs on appeal are awarded to defendants.

_____
Kane, J.

WE CONCUR:

_____
Dawson, Acting P.J.

_____
Hill, J.